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No. 04-712

IN THE

Supreme Court of the United States

LINCOLN PROPERTY COMPANY and
STATE OF WISCONSIN INVESTMENT BOARD,
Petitioners,

v.

CHRISTOPHER ROCHE and JUANITA ROCHE,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether an entity not named or joined as a defendant in the lawsuit can nonetheless be deemed a "real party in interest" to destroy complete diversity of citizenship in a case removed from state court under 28 U.S.C. § 1441(b).

2. Whether a limited partnership's citizenship for diversity jurisdiction subject-matter jurisdiction purposes is determined not by the citizenship of its partners but by whether its business activities establish a "very close nexus" with the state.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. The Fourth Circuit's Presumption Against Removability Is an Invention of the Lower Federal Courts that Has No Foundation in This Court's Decisions and Is Contrary to Normal Principles of Statutory Construction 9

II The Framers Intended the Federal Courts to Be Open to Diversity Cases, Including Both Cases Originally Filed in Federal Court and Ones Removed to Federal Court by Out-of-State Defendants 15

CONCLUSION 21

TABLE OF AUTHORITIES

Cases: **Page**

Breuer v Jim's Concrete of Brevard, Inc,
538 U.S. 691 (2003) 7, 15
Danca v Private Health Care System, Inc,
185 F.3d 1 (1st Cir. 1999) 9
Dardeau v West Orange-Grove Consol. Indep
Sch Dist., 43 F. Supp. 2d 722 (E.D. Tex. 1999) 19
Dixon v Coburg Dairy,
369 F 3d 811 (4th Cir. 2004)(*en banc*) 5
Healy v. Ratta,
292 U.S. 263 (1934) 12
Lee v Chesapeake & Ohio Ry Co,
260 U.S. 653 (1923) 18
Martin v Hunter's Lessee,
14 U S. (1 Wheat) 304 (1816) 17
Murphy Bros, Inc. v Michetti Pipe Stringing, Inc,
526 U.S. 344 (1999) 7, 14
Russell Corp v American Home Assur Co,
264 F.3d 1040 (11th Cir. 2001) 9
Shamrock Oil & Gas Corp v Sheets,
313 U S. 100 (1941) ..... *passim*
State Farm Fire & Cas Co v Tashire,
386 U.S. 523 (1967) 13
Tennessee v Davis,
100 U.S. 257 (1880) 17
Thermtron Prods, Inc. v Hermansdorfer,
423 U.S. 336 (1976) 20

Statutes and Constitutional Provisions: **Page**

U.S. Const., Art. III, § 2 16

Class Action Fairness Act of 2005,
Pub L 1092, 119 Stat. 4 13

Judiciary Act of 1789 16
ch. 20, § 12, 1 Stat. 73, 79-80 17

Removal Act of 1875,
Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 17

Judiciary Act of 1887,
Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 553 18

28 U.S.C. § 1441(a) 14, 15
28 U.S.C. § 1447(d) 10

28 U.S.C. § 1446(b) (1949) 14

28 U S.C. § 71 (1940) 10

Page

Miscellaneous:

109 S. Rep. 14, 109th Cong., 1st Sess. 13

Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U.L. REV. 609 (Spring 2004) 20

3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (2d ed. 1836) . 16

THE FEDERALIST NO. 80 (Alexander Hamilton) (Garry Wills ed., 1982) 16

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

WLF is a non-profit public interest law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government.[1] WLF regularly files briefs in this Court and other federal and state courts in cases in which the procedural fairness afforded the defendant can reasonably be called into question. *See, e g , Baxter International Inc. v. Asher*, *cert denied*, 125 S. Ct. 1639 (2005); *3M Co. v Johnson*, 895 So.2d 151 (Miss. 2005). In particular, WLF has participated in cases in which it believes the courts have unduly restricted the rights of defendants in a state court action to remove the case to federal court. *See, e g , American Home Products Corp v Collins, cert. denied*, 125 S. Ct. 1823 (2005).

WLF fully supports Petitioners' request that the Court reverse the appeals court's judgment and hold that Petitioners properly removed this case from state to federal court. WLF writes separately in order to emphasize its particular concern over the manner by which the appeals court reached its decision: it began by declaring that all removal statutes should be "strictly construed" against the defendant seeking removal, and that "all doubts" should be resolved in favor of remanding such cases to state court. Pet. App. 7a Although this Court's

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[1] Pursuant to Supreme Court Rule 37 6, WLF states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief WLF submits this brief in support of Petitioners with the written consent of all parties The written consents are on file with the Clerk of the Court

precedents, properly understood, do not support creation of a presumption against removability, lower federal courts are invoking such a presumption with increasing frequency to justify remand orders. WLF is submitting this brief in hopes that the Court will provide guidance to the lower federal courts on that issue.

WLF is also concerned that if affirmed, the Fourth Circuit's decision will significantly impair the right of out-of-state defendants to remove cases to federal court pursuant to the federal courts' diversity jurisdiction – thereby frustrating the intent of Congress that such cases be removable as a means of ensuring that out-of-state defendants can have their cases heard in an impartial forum.

STATEMENT OF THE CASE

Congress has determined that, in general, parties sued in a State court are entitled to remove the case to federal court if the federal district courts have original, diversity jurisdiction over the action. 28 U.S.C. § 1441. In determining whether diversity jurisdiction cases are removable, Congress has instructed courts to focus on the citizenship of only those defendants who have been "properly joined and served." *Id.* This case tests whether the heretofore uniformly recognized definition of a "properly joined and served" defendant should be expanded substantially (as the Fourth Circuit held), thereby significantly impairing the ability of defendants to exercise their statutory right to removal – a right that has existed throughout our nation's history.

This petition involves a lawsuit filed in Virginia state court for damages allegedly sustained by Respondents Christopher and Juanita Roche as a result of their lease of a residential apartment in Fairfax County, Virginia. The Roches

allege that toxic mold present in their apartment caused and exacerbated certain medical conditions, and that some of their personal property was misplaced or stolen while defendants were taking steps to eliminate the mold. Pet. App. 1a. The Roches filed suit in August 2002, asserting a variety of state statutory and common law claims. Named as defendants were Lincoln Property Co. ("Lincoln"); the State of Wisconsin Investment Board ("SWIB"), the owner of the residential development in which the Roches resided; and Invesco International. The issues before the Court turn solely on the citizenship of Lincoln and its affiliates.[2]

The defendants promptly removed the case to the U.S. District Court for the Eastern District of Virginia, invoking diversity jurisdiction. The Roches are citizens of Virginia, and in their removal papers the defendants contended that they were not citizens of Virginia. The district court agreed and denied the Roches' efforts to have the case remanded to state court *Id* 84a-93a. The district court held that Lincoln should be deemed a citizen of Texas because it is incorporated in Texas and has its principal place of business there. *Id* 86a-87a. The district court also held that even if one took into consideration the citizenship of EQR Lincoln Limited Partnership ("EQR"), a Lincoln affiliate that does business in Virginia but was not named as a defendant, diversity jurisdiction still existed – because EQR is not a citizen of

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[2] Invesco was dismissed from the case in November 2002 It is not a party before this Court, the Roches do not challenge the dismissal order, and no party has suggested that Invesco's status has any bearing on the removal jurisdiction of the federal courts in this case Similarly, although there was some dispute in the lower courts regarding whether SWIB should be deemed a citizen of Wisconsin, neither SWIB's citizenship nor the relevance of that citizenship to removal jurisdiction is before the Court

Virginia (by virtue of the fact that it is a limited partnership and none of its partners is a Virginia citizen). *Id.* 87a-88a. After, the district court entered judgment on the merits in favor of Lincoln and SWIB, the Roches appealed the denial of their remand motion.

On appeal, the Fourth Circuit reversed the district court's conclusion that the case had been properly removed, and directed the district court to remand the case to Virginia state court. Pet. App. 1a-19a. The court held that, for purposes of determining whether diversity jurisdiction existed, the citizenship of "the Virginia subsidiary" (*i e* , EQR) should be taken into account because – by virtue of EQR's status as a Lincoln affiliate that carried out much of the day-to-day management responsibilities at the Roches' apartment complex – it should be deemed a "real party in interest." *Id* 16a. The appeals court further held that Petitioners had failed to meet their burden of establishing that EQR was not a citizen of Virginia; the court based that holding on findings that: (1) EQR "owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth, which is much stronger that any nexus to Texas made apparent by the record," *id* ; and (2) Petitioners had provided insufficient evidence to meet their burden of establishing that all of EQR's partners (including its limited partners) were not citizens of Virginia. *Id* 12a-14a.[3]

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[3] The Roches contend that the Fourth Circuit actually based its holding on a finding that Lincoln itself was a citizen of Virginia, they argue that the appeals court held that the "Lincoln Property Company" named in the complaint was a limited partnership and that Petitioners had failed to carry their burden of demonstrating that all of the partnership's limited partners were not Virginia citizens Opp Br 5, 6, 14 That contention is without merit The Fourth Circuit very clearly understood that "the nominal and ultimate parent company, Lincoln (continued)

Underlying the appeals court's entire consideration of the remand issue was its conclusion that the removal statutes should be strictly construed against defendants seeking to exercise their removal rights. The appeals court explained its understanding of the law as follows:

> [I]t is well-settled that courts strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court. *Shamrock Oil & Gas Corp v Sheets*, 313 U.S. 100, 108-09 (1941); *Dixon v Coburg Dairy,* 369 F.3d 811 (4th Cir. 2004) (*en banc*) ("We are obliged to construe removal jurisdiction strictly because of the 'significant federalism concerns' implicated. Therefore, '[i]f federal jurisdiction is doubtful, a remand [to state court] is necessary.'") (citations omitted).

Id 7a. Each of the Fourth Circuit's principal findings – that EQR, although not named as a defendant, should be deemed a real party in interest for purposes of determining diversity jurisdiction; that EQR should be deemed a Virginia citizen because of its "very close nexus" to Virginia; and that Petitioners had failed to carry their burden of establishing that EQR's limited partners were not Virginia citizens – was

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[3] (continued)
Property Company, is a Texas citizen " Pet App 16a The Fourth Circuit based its holding not on a finding that Lincoln was a Virginia citizen, but rather on a finding that Lincoln had failed to establish that EQR, "the Virginia subsidiary" and "the real and substantial party in interest," was not a citizen of Virginia *Id* Indeed, there would have been no reason whatsoever for the appeals court to have engaged in its "real party in interest" analysis if it had truly determined – as alleged by the Roches – that the named defendant, Lincoln Property Company, was a Virginia citizen

significantly colored by the court's understanding that removal jurisdiction should be strictly construed against Petitioners.

SUMMARY OF ARGUMENT

In holding that removal statutes are to be "strictly construed" and that "all doubts" regarding removability are to be resolved "in favor of remanding the case to state court," Pet. App. 7a, the Fourth Circuit finds itself well within the mainstream of lower federal court decisions. Over the past 60 years, the lower federal courts have grown increasingly hostile to diversity jurisdiction in general and, in particular, to cases removed to federal court on the basis of diversity of citizenship.

Many of these presumption-against-removability decisions purport to rely on decisions of this Court. WLF respectfully submits that all such reliance is in error; no decision of this Court has ever endorsed a presumption against removability or mandated that "all doubts" regarding removability should be resolved in favor of ordering remand. WLF agrees with Petitioners that remand in this case was wholly unwarranted – regardless whether one accepts the Fourth Circuit's presumption against removability. But WLF believes nonetheless that the likelihood of error would have been reduced significantly if the appeals court had not applied its ill-considered presumption. Accordingly, WLF urges the Court to provide guidance to the lower federal courts by stating explicitly that removability is to be determined solely on the basis of the governing statutory language and not on the basis of any presumptions for or against removability.

In support of its presumption against removability, the Fourth Circuit cited this Court's 1941 *Shamrock Oil* decision. Pet. App. 7a. Far from creating any general presumption

against removability, *Shamrock Oil* stated explicitly that its decision "turn[ed] on the meaning of the removal statute." *Shamrock Oil*, 313 U.S. at 104. The statute at issue had been adopted in 1887, and it unquestionably cut back on removal rights created by an earlier removal statute, adopted in 1875. The Court also determined that removal statutes adopted in the decades after 1887 evidenced a congressional policy of "strict construction" of removal statutes *Id* at 108. But the Court ruled against removability of the case before it based solely on that statutory history, not based on federalism concerns or any other general policy considerations. Accordingly, the Fourth Circuit's reliance on *Shamrock Oil* was misplaced.

The early twentieth century congressional policy of strictly limiting removal rights is no longer in place. Numerous federal statutes adopted in recent decades have expanded removal rights. Most recently, the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4, significantly expands the right of defendants to remove putative class action lawsuits to federal court. There is no longer any statutory basis for inferring a congressional intent that removal statutes be strictly construed against removability. Recent decisions of this Court have decided removability questions solely by reference to the relevant statutory language, without any mention of a presumption against removability. *See, e g*, *Breuer v Jim's Concrete of Brevard, Inc*, 538 U.S. 691 (2003), *Murphy Bros, Inc. v Michetti Pipe Stringing, Inc*, 526 U.S. 344 (1999).

Indeed, the Fourth Circuit's generalized presumption against removability is inconsistent with the Framer's understanding of the important roles that diversity jurisdiction and removal jurisdiction were to play in our federal system of government. Throughout our nation's history, the right to remove cases to federal court has played an important role in

ensuring that out-of-state defendants have available to them an impartial judicial forum. The hostility displayed by some federal district judges to removal jurisdiction appears to be based in part on a misguided belief that cases raising state law issues are most appropriately heard in State courts. To the contrary, it is no less important today than it was in the 1780's to ensure that out-of-state litigants have a means of avoiding State courts, which have a natural tendency to favor in-state litigants.

Given the Framer's strong endorsement of diversity jurisdiction and removal jurisdiction, it is somewhat anomalous to suggest that removing cases from State court to federal court in some way violates notions of federalism. Nor do principles of comity counsel in favor of strict construction of removal statutes. Indeed, because State court judges have been complaining at least as loudly in recent years as have federal judges regarding overcrowded dockets, it is highly unlikely that State court judges consider it an affront to their dignity when recently filed cases are removed from their dockets at the request of one of the parties.

The Fourth Circuit's unwarranted adoption of a presumption against removability caused it to conclude erroneously that the district court was required to remand the case to State court. Similar presumptions adopted by numerous other federal courts are improperly denying a federal forum to numerous defendants. WLF respectfully requests that the Court's decision state explicitly that the Fourth Circuit erred in deciding this case on the basis of a generalized presumption against the removability of cases from State court to federal court.

ARGUMENT

I. The Fourth Circuit's Presumption Against Removability Is an Invention of the Lower Federal Courts that Has No Foundation in This Court's Decisions and Is Contrary to Normal Principles of Statutory Construction

Underlying the appeals court's entire consideration of the remand issue was its conclusion that the removal statutes should be construed strictly against defendants seeking to exercise their removal rights. The court held that it is "well-settled" that courts should "resolve all doubts in favor of remanding the case to state court." Pet. App. 7a. It further held that "significant federalism concerns" implicated by removal jurisdiction makes "necessary" the remand of removed cases whenever "federal jurisdiction is doubtful." *Id* That presumption against removability has no foundation in this Court's decisions and is contrary to normal rules of statutory construction. That presumption led the Fourth Circuit to conclude erroneously that the case should be remanded to State court.

Unfortunately, the Fourth Circuit is not alone among the lower federal courts in erroneously adopting a generalized presumption against removability. That presumption has been cited by scores of federal court decisions as the basis for remanding cases to State court [4] In light of the widespread

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[4] *See, e g , Russell Corp v American Home Assurance Co ,* 264 F 3d 1040, 1050 (11th Cir 2001), *Danca v Private Health Care Systems, Inc ,* 185 F 3d 1, 4 (1st Cir 1999), *Tran v Waste Management, Inc ,* 290 F Supp 2d 1286,1291-92 (M D Fla 2003), *Shadie v Aventis Pasteur, Inc ,* 254 F Supp 2d 509, 514 (M D Pa 2003), *Murphy v*

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misperception among the lower federal courts regarding the existence of such a presumption, WLF urges the Court to provide guidance to the lower federal courts by stating explicitly that removability is to be determined solely on the basis of the governing statutory language and not on the basis of any presumptions for or against removability.[5]

Virtually all of these cases (including the Fourth Circuit below, Pet App. 7a) cite *Shamrock Oil* in support of the existence of a generalized presumption against removability. Far from creating any general presumption against removability, *Shamrock Oil* stated explicitly that its decision "turn[ed] on the meaning of the removal statute." *Shamrock Oil,* 313 U.S. at 104.

Because that decision has been so widely misinterpreted, a detailed discussion of the case's actual holding is warranted. The plaintiff Shamrock Oil (a noncitizen of Texas) had filed suit against Sheets (a Texas citizen) in Texas state court to collect on a debt. When Sheets filed a counterclaim based on an unrelated breach of contract, Shamrock Oil sought to remove the counterclaim to federal court. The then-applicable removal statute (which dated from 1887) provided for removal of a cause of action only "by the defendant or defendants therein." 28 U.S.C. § 71 (1940). The Court rejected

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[4](continued)
Newell Operating Co , 245 F Supp 2d 316, 318 (D Mass 2003), *Alessi v Beracha*, 244 F Supp 2d 354, 356 (D Del 2003), *Curtin v Port Authority of New York and New Jersey*, 183 F Supp 2d 664, 667 (S D N Y 2002), *Premier Holidays Int'l , Inc v Actrade Capital, Inc* , 105 F Supp 2d 1336, 1338 (N D Ga 2000)

[5] Such guidance is particularly appropriate in light of the statutory bar on appeals from remand orders, a bar that renders erroneous remand orders largely uncorrectable *See* 28 U S C § 1447(d)

Shamrock Oil's claim that it should be deemed a "defendant" within the meaning of the statute. 313 U.S. at 107. The Court noted that: (1) under the removal statute in effect from 1789 to 1875, plaintiffs in Shamrock Oil's position had been denied the right to remove counterclaims to federal court; (2) in 1875, Congress adopted a significantly liberalized removal statute that, *inter alia*, provided explicitly for removal by plaintiffs as well as by defendants; and (3) in 1887, Congress adopted a more restrictive removal statute that omitted any reference to removal by plaintiffs and adopted language substantially similar to the language of the 1789 removal statute. 313 U.S. at 104-06. Based on the 1887 statute's omission of any reference to removal by "plaintiffs" and the history of denying removal rights to plaintiffs before they were explicitly granted such rights in 1875, the Court concluded that Congress, when it adopted the 1887 statute, intended to eliminate the right of plaintiffs to remove cases to federal court *Id* at 107. In other words, the Court's decision was based primarily on its interpretation of Congress's intent in adopting the 1887 removal statute. Indeed, the Court stated explicitly that "at the outset it is to be noted that decision turns on the meaning of the removal statute" adopted by Congress in 1887. *Id* at 104.

The Court concluded its decision with the passage that has given rise to holdings by many federal courts that there exists a generalized presumption against removability:

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by

> the action of Congress in conformity to the Judiciary articles of the Constitution "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v Ratta*, 292 U.S. 263, 270 (1934).

Id at 108-09.

Shamrock Oil's language cannot plausibly be interpreted as creating a presumption against removability that is based on anything more than an interpretation of relevant congressional statutes. The Court said that its call for "strict construction" of the 1887 removal statute was based solely on "the policy of the successive acts of Congress regulating the jurisdiction of the federal courts." *Id* [6] Accordingly, a determination that there exists a present-day "strict construction" requirement cannot rely on *Shamrock Oil*, which was based on an examination of late nineteenth century and early twentieth century statutes [7]

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[6] The Court did not specify which "successive acts of Congress" it had in mind One can surmise that the Court was referring to successive statutes that gradually increased the minimum dollar amount in controversy necessary to invoke federal court jurisdiction That surmise is based on the fact that *Healy v Ratta*, the case referenced in the text, addressed an issue regarding whether the amount in controversy met the jurisdictional minimum

[7] Nor can the Fourth Circuit justify its presumption against removability by pointing to *Shamrock Oil*'s "rightful independence of state governments" language That language says no more than that federal courts should not extend their jurisdiction any farther than the "precise limits" authorized by Congress 313 U S at 109 Nothing in that language suggests the rule adopted by the Fourth Circuit that "all doubts" regarding removability should be resolved "in favor of

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Nor is there any constitutional basis for disfavoring removal jurisdiction. As this Court has repeatedly recognized, Article III of Constitution authorizes federal court jurisdiction over any lawsuit in which there is even "minimal diversity"; "complete diversity," generally required for maintaining diversity jurisdiction, is a requirement imposed solely by statute. *State Farm Fire & Cas Co v. Tashire*, 386 U.S. 523 531 (1967).

The early twentieth century congressional policy of strictly limiting removal rights is no longer in place; in the absence of such a congressional policy, the Fourth Circuit's presumption against removability cannot be justified. The most recent evidence that Congress does not mandate a presumption against removability is its adoption earlier this year of the Class Action Fairness Act of 2005 ("CAFA"), Pub. L 1092, 119 Stat. 4. Section 5 of CAFA significantly expands the right of defendants to remove putative class action lawsuits from State courts to federal court by, among other things, abolishing the "complete diversity" requirement in such cases. CAFA justified its expansion of removal jurisdiction in part by explicit findings that State courts are "sometimes acting in ways that demonstrate bias against out-of-State defendants" and that litigation abuses in State courts "undermine . . . the concept of diversity jurisdiction as intended by the framers of the United States Constitution." CAFA, § 2(a)(4). *See also* 109 S. Rep. 14, 109th Cong., 1st Sess., § IV(B)(1) (Feb. 28, 2005) (CAFA is intended not only to protect against actual discrimination by State courts against non-citizens of the State, but also to prevent even the appearance of discrimination in favor of local residents).

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[7](continued)
remanding the case to state court " Pet App 7a

Amendments to the removal statutes since 1948 have done nothing to contract removal jurisdiction to any material degree, and (as noted above in the case of CAFA) have often liberalized the rules governing removal. For example, between 1949 and 1965, the removal statutes provided that a defendant waived its removal rights unless it filed its removal petition within 20 days of receipt of the complaint. 28 U.S.C. § 1446(b) (1949); *see* Act of May 24, 1949, § 83(a), 63 Stat. 101. In 1965, Congress extended the period for removal from 20 days to 30 days (the current time period). *See* Act of September 29, 1965, 79 Stat. 887; *Murphy Bros* , 526 U.S. at 352 n.3.[8]

Similarly, before 1948, 28 U.S.C. § 1441(a) provided simply that any action within the original subject-matter jurisdiction of the federal courts could be removed, and did not specify when exceptions to that general rule would be appropriate. In 1948, Congress added to the statute a provision (which is still part of the law) mandating that actions within original subject matter jurisdiction are removable "except as

[8] *Murphy Bros* is a good example of the Court's post-*Shamrock Oil* pattern of deciding removal issues solely by reference to standard tools of statutory construction, rather than applying presumptions to interpret statutes arguably open to two different interpretations *Murphy Bros* interpreted § 1446(b) as providing that the 30-day removal period does not begin to run until after the defendant has actually received formal service of the complaint, even though the statutory language at issue ("thirty days after the receipt by the defendant, through service *or otherwise*, of a copy of the [complaint]") could very plausibly have been interpreted as providing that the 30-day period begins to run as soon as the defendant receives the complaint from any source – including a courtesy copy sent through the mail The Court arrived at its interpretation using standard tools of statutory construction and simply ignored the plaintiff's arguments that *Shamrock Oil* required adoption of the plausible interpretation that would have entailed a remand

otherwise *expressly* provided by Act of Congress." Act of June 25 1948, § 1441(a), 62 Stat. 937 (emphasis added). The Court later interpreted the "expressly provided" clause as mandating that the right to removal will never be deemed precluded based on statutory language that only *arguably* precludes removal. *Breuer*, 538 U.S. at 697.[9]

In sum, nothing in this Court's case law required the Fourth Circuit to bias its consideration of this case by invoking a presumption against removability and resolving all doubts in favor of remanding the case to State court. By relying on a presumption not based on congressional statutory commands, the Fourth Circuit erroneously departed from normal rules of statutory construction.

II. The Framers Intended the Federal Courts to Be Open to Diversity Cases, Including Both Cases Originally Filed in Federal Court and Ones Removed to Federal Court by Out-of-State Defendants

By asserting that federal removal jurisdiction must be construed "strictly" because it raises "significant federalism concerns," Pet. App. 7a, the Fourth Circuit signaled its contention that removal jurisdiction is at least to some extent at odds with the Framers' vision regarding operation of the federal courts. That contention is erroneous; to the contrary,

[9] The Court explicitly and unanimously rejected arguments that *Shamrock Oil* required the Court to interpret the ambiguous statute as precluding the right to removal After quoting *Shamrock Oil*'s "strict construction" language, the Court said, "But whatever apparent force this argument might have claimed when *Shamrock* was handed down has been qualified by later statutory development," citing the 1948, post-*Shamrock Oil* addition of the "except as otherwise expressly provided" clause to 28 U S C § 1441(a) *Breuer*, 538 U S at 697

diversity jurisdiction and removal jurisdiction were contemplated by the Framers as playing a vital role in our federal system of government. Given the important role that the right to remove cases to federal courts has played in ensuring that out-of-state defendants have available to them an impartial judicial forum, the Court should carefully examine any efforts by the federal appeals courts to cut back on removal rights.

The need to protect out-of-state litigants from the biases of state courts was widely discussed at the time the Constitution was being drafted. For example, James Madison argued that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 533 (2d ed. 1836). Similarly, Alexander Hamilton argued that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included within the "judicial Power" cases "between Citizens of different States." U.S. Const., Art. III, § 2.

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction could not by itself fully address the problem: it provided no protection to nonresident defendants sued in state court.

Section 12 of the Judiciary Act addressed that latter concern by authorizing a nonresident defendant sued by a resident plaintiff in state court to remove the case to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v Davis*, 100 U.S. 257, 265 (1880). This Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Martin v Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348 (1816).

The federal government's distrust of State court's ability to deal fairly with noncitizen litigants reached a peak in the period following the Civil War. In an effort to protect federal officers and freed former slaves, Congress adopted a series of laws that extended both the original and removal jurisdiction of the federal judiciary. This legislative initiative culminated in the Removal Act of 1875,[10] a law that not only vested federal courts with federal question jurisdiction for the first time, but also significantly expanded removal jurisdiction. Among other provisions, the 1875 law provided for removal

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[10] Act of Mar 3, 1875, ch 137, 18 Stat 470

of State court cases raising federal questions, permitted removal by plaintiffs, permitted removal of an entire lawsuit if it contained *any* controversy between citizens of different states, and provided for appellate review of remand orders.

The experiment with greatly expanded removal jurisdiction lasted only 12 years, when the Judiciary Act of 1887 largely eliminated the expansions adopted in 1875 *See* Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. In particular, the 1887 statute eliminated the right to removal by plaintiffs and by resident defendants. Importantly, however, the 1887 statute was not viewed as an abandonment of the Framers' commitment to diversity jurisdiction and removal jurisdiction To the contrary, the 1887 largely restored the law regarding removal of diversity jurisdiction cases to the provisions contained in the Judiciary Act of 1789. As the Court recognized in *Lee v Chesapeake & Ohio Ry Co* , 260 U.S. 653 (1923), the right of removal should not be abridged beyond restrictions explicitly included in the 1887 statute:

> While the comparison between [the 1875 statute and the 1887 statute, as amended in 1888] shows that Congress intended to contract materially the jurisdiction on removal, it also shows how the contraction was to be effected. Certainly there is nothing in this which suggests that the plain terms of the act of 1888 – by which it declared that any suit "between citizens of different states" brought in any state court and involving the requisite amount, "may be removed by the defendant or defendants" where they are "non-residents of that State" – should be taken otherwise than according to their natural and ordinary signification.

Lee, 260 U.S. at 660-61.

The Court's decision 18 years later in *Shamrock Oil* needs to be understood within the context of this history. *Shamrock Oil* correctly noted that the 1887 statute was adopted for the purpose of restricting the expanded removal jurisdiction created by the 1875 statute. The Court also correctly noted that "successive acts of Congress" had restricted removal jurisdiction somewhat by increasing the jurisdictional amount. *Shamrock Oil*, 313 U.S. at 108. The Court made those observations in support of its conclusion that Congress in 1887 had intended to eliminate plaintiffs' right to remove cases – a right that had not been included within the Judiciary Act of 1789 and had only been created in 1875. *Id* Understood in that context, *Shamrock Oil* should not be interpreted as a rejection of the Framers' embrace of removal jurisdiction as a integral part of our federalism. To the contrary, the Court endorsed a return to an understanding of removal jurisdiction that closely mirrored the Framers' understanding. In reminding lower federal courts that the should "scrupulously confine their own jurisdiction to the precise limits" ordained by Congress, *id.* at 109, the Court was merely reminding lower courts that the power to establish the jurisdiction of the lower federal courts is vested by the Constitution in Congress, not the courts themselves.

In sum, nothing in our constitutional history suggests that removal jurisdiction in diversity cases is in any way at odds with accepted notions of federalism. Some federal courts have expressed reluctance to exercise removal jurisdiction because of comity concerns; they view one court divesting another court of jurisdiction as somewhat unseemly and/or discourteous. *See, e g., Dardeau v West Orange-Grove Consolidated Indep School Dist.*, 43 F. Supp. 2d 722, 730 (E D. Tex 1999). But as one observer has cogently responded:

> [T]he comity argument appears somewhat contrived in the context of removal. State courts have given little indication that they consider it an affront to their dignity to have a case transferred to federal court. Given the persistent plea by many state courts that their dockets are overcrowded, a far greater concern of state courts may well be that the federal courts will relieve the congestion on their own dockets at the expense of state courts.

Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV 609, 660 (Spring 2004).

This Court in no uncertain terms has rejected suggestions that remand can be justified by a federal court's desire to reduce its backlog of cases. In reversing a remand order based on a district court's concerns that its docket was overcrowded, the Court stated: "An otherwise properly removed action may no more be remanded because a district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state court for such reason." *Thermtron Prods, Inc v Hermansdorfer*, 423 U.S. 336, 344 (1976).

WLF respectfully suggests that many district courts nonetheless will be sorely tempted to issue remand orders on precisely that grounds, albeit the remand orders will be couched in terms of federalism concerns. WLF urges the Court to guard against that temptation by making clear that federalism concerns generally do not justify remand orders, which instead should be issued only when mandated by the applicable congressional statute.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court reverse the judgment below.

Respectfully submitted,

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